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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK M. TURNER,

Defendant and Appellant.

B211822

(Los Angeles County  
Super. Ct. No. BA340977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Morgan H. Anderson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

## **INTRODUCTION**

A jury found defendant and appellant Derrick M. Turner guilty of making a criminal threat (Pen. Code, § 422<sup>1</sup>) and possessing marijuana for sale (Health & Saf. Code, § 11359). The trial court sentenced defendant to two years in state prison.

On appeal, defendant contends that the trial court erred in admitting certain evidence that lacked foundation and in failing to instruct the jury with an accomplice instruction. Defendant further contends that even if neither contended error standing alone requires reversal of the judgment, the cumulative prejudicial effect of the errors rendered his trial fundamentally unfair and a violation of due process. We affirm.

## **BACKGROUND**

In May 2008, Carrenda Bass lived in the San Julian Hotel in the Skid Row area of Los Angeles. Bass was addicted to cocaine base and had previously been convicted of solicitation for prostitution.

According to Bass, defendant “navigated” the sale of drugs on San Julian Street. Defendant asked Bass to store his drugs in her residence. Defendant would then call Bass on the telephone and Bass would bring the drugs to defendant or to whomever defendant instructed her to take the drugs. Bass did what appellant told her to do because she had seen what would happen if she did not follow defendant’s directions. Bass had seen defendant slap a woman who did not want to sell his drugs any longer.

After defendant asked Bass to store marijuana for him on one occasion, Bass gave away some of the marijuana. The next morning, May 15, 2008, defendant asked Bass if some of his marijuana was missing. Defendant said that he was “fiercely mad” at Bass and that she should tell him the truth. Defendant stated that if Bass lied, he would hurt her. Bass admitted that she had given some of the drugs away. Defendant told Bass that she was taking food out of his family’s mouth and slapped Bass across her face.

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<sup>1</sup> All statutory citations are to the Penal Code unless otherwise noted.

Defendant told Bass to go into her residence and retrieve the rest of his “shit.” As Bass entered the hotel, defendant followed her. When Bass and defendant encountered another hotel resident, defendant went outside to wait for Bass. Bass entered her room, closed and locked her door, and called the police. Defendant banged on Bass’s window. Defendant stated that he would not hit Bass again and that she should just bring his “stuff” out. Defendant also called Bass on the telephone and told her that he was going have his “girls” “kick [Bass’s] ass,” if she came outside. Defendant warned Bass that she “better not come outside.” Defendant remained outside of Bass’s residence for 20 to 30 minutes.

Defendant left and the police arrived. Bass told the police that defendant had threatened her. The police officers asked Bass what she wanted them to do and acted as if they did not want to do anything. Bass told the officers to leave. Bass called the police station and obtained the cellular telephone number for Los Angeles Police Officer Deon Joseph, who acted as a liaison between the Skid Row community and the police. Bass called Officer Joseph and left a message. Bass feared for her life and remained in her room until Officer Joseph returned her call.

Bass told Officer Joseph “what had been going on that day” and “that that weed was in [her] house.” Bass asked Officer Joseph to go to her residence to retrieve defendant’s marijuana. Officer Joseph retrieved seven bags of marijuana from Bass’s residence. Officer Joseph opined that the bags were possessed for sale.

On May 20, 2008, Officer Joseph contacted defendant in San Julian Park. Officer Joseph recovered from defendant one baggie of marijuana and currency in various denominations. The baggie of marijuana recovered from defendant was packaged in exactly the same way as the marijuana recovered from Bass’s residence. Officer Joseph compared the marijuana in the bag he recovered from defendant to the marijuana in the bags he recovered from Bass’s residence and determined that they smelled the same, looked the same, and appeared to be the same type of marijuana. Officer Joseph opined that defendant possessed the marijuana retrieved from his person for personal use.

## DISCUSSION

### **I. The Trial Court's Admission Of Bass's Testimony That She Stored Drugs For Defendant Because She Saw Defendant Slap A Woman Who Did Not Follow Directions**

Defendant contends that his Fifth and Fourteenth Amendment rights to due process were violated when the trial court permitted Bass to testify that she stored defendant's drugs because she had seen defendant slap a woman who did not follow directions. Defendant asserts that the evidence lacked foundation under Evidence Code section 702 and that therefore the admission of the evidence violated his constitutional rights.

#### *A. Background*

The prosecutor asked Bass why she stored drugs for defendant. Bass responded that she "had seen what had happened before to someone who didn't follow the directions." The prosecutor asked what happened to someone when they did not follow directions. Bass responded, "She got slapped." Defense counsel objected to Bass's response on a number of grounds. The trial court sustained defense counsel's foundation objection.

The prosecutor asked to speak to the trial court at sidebar. The prosecutor indicated that he believed he could establish a foundation for Bass's testimony because Bass had seen the person get slapped. Thereafter, the prosecutor examined Bass as follows:

"Q Ma'am, you mentioned there was an incident where you said you knew what would happen if you didn't follow directions. Did you actually see this occur?

"A Yes, I did.

"Q And what exactly did you see occur?

"A Um, the young lady didn't want to sell his drugs anymore.

"Q And what happened?

"A He slapped her."

*B. Forfeiture*

When the prosecutor stated he could establish a foundation for Bass's testimony concerning the slap by eliciting Bass's testimony that she saw the person get slapped, defense counsel did not object that such testimony would not establish a proper foundation. Defense counsel also did not object on foundation grounds, or at all, when Bass testified that she saw the woman get slapped. Accordingly, defendant forfeited review of this issue. (*People v. Lewis* (2001) 26 Cal.4th 334, 357; *People v. Price* (1991) 1 Cal.4th 324, 430.)<sup>2</sup>

Defendant contends that his initial foundation objection was sufficient to preserve this issue for appeal. Defense counsel's initial foundation objection concerned Bass's testimony that someone got slapped for not following directions.<sup>3</sup> The testimony to which defendant objects on appeal does not concern the fact of the slap, but the reason for the slap. Defendant's contention on appeal concerns Bass's subsequent testimony that "the young lady didn't want to sell his drugs anymore." Because defendant's initial objection related to a matter different than that raised on appeal, it was insufficient to preserve the issue for appeal.

Defendant contends that if we find that defense counsel's failure to object to the admission of Bass's testimony on foundation grounds forfeits appellate review of this issue, then defense counsel's failure constitutes ineffective assistance of counsel.

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a

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<sup>2</sup> Defendant also did not object on any constitutional grounds. (See *People v. DiPriest* (2007) 42 Cal.4th 1, 19, fn. 6.)

<sup>3</sup> "Q Okay. And what happened to someone when they don't follow the directions?

"A She got slapped.

"[Defense counsel] Objection. Speculation, argumentative, motion to strike. Lack of foundation as well."

reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]” (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) “Generally, . . . prejudice must be affirmatively proved. [Citation.] ‘It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster, supra*, 111 Cal.App.4th at p. 383.)

We need not determine “whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Boyette* (2002) 29 Cal.4th 381, 430-431 [“We reject defendant's contention that his counsel were ineffective for failing to object, because even assuming counsel's inaction was unreasonable, no prejudice resulted”].) Because, as we explain below, defendant was not prejudiced by the admission of the contested testimony, defendant was not prejudiced by the failure to object to that testimony and thus did not receive ineffective assistance of counsel. (*In re Fields, supra*, 51 Cal.3d at p. 1079; *People v. Boyette, supra*, 29 Cal.4th at pp. 430-431.)

### C. Evidence Code Section 702

Defendant contends that Bass's testimony that “the young lady didn't want to sell his drugs anymore” lacks foundation because it was not based on her personal knowledge. Defendant contends that the record does not contain any indication that Bass overheard a conversation between defendant and the woman he allegedly slapped, and

there is no reason to believe Bass's testimony was other than pure speculation. Even if Bass had overheard such a conversation, defendant contends, testimony about such a conversation would have had to "survive a hearsay objection."

Evidence Code section 702, subdivision (a) states, in pertinent part, that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter."

If defendant had objected to the contested testimony on lack of foundation grounds, and the trial court overruled the objection, defendant might be correct that the trial court would have erred in admitting the evidence. As discussed above, however, defendant's initial foundation objection concerned the fact that a woman was slapped, and the testimony contested on appeal concerns the reason the woman was slapped. Accordingly, the trial court did not err in admitting the contested testimony.

#### *D. Prejudice*

Defendant contends that the prosecutor used Bass's contested testimony to demonstrate that Bass would have reason to have sustained fear, a necessary element of the criminal threat charge. Defendant further contends that the evidence tended to make him "look like more of a bad guy who had a propensity to abuse women." Any prejudice from the admission of Bass's contested testimony was harmless.

The basis for the criminal threat charge was defendant's statement to Bass that he would get his "girls" would "kick [Bass's] ass." Bass's testimony concerning the slap explained why she stored defendant's drugs in her residence. That testimony did not address whether Bass reasonably was in sustained fear for her safety based on defendant's threat that he would get his "girls" to "kick [Bass's] ass." Moreover, even if the prosecutor's closing argument might be construed as arguing that Bass had reason to fear defendant based on her testimony concerning the woman who was slapped for refusing to sell defendant's drugs, it remains that defendant slapped Bass before he threatened her. Thus, reasonably, Bass's reason for having sustained fear for her safety

was that defendant had just slapped her, and not that defendant had slapped another woman on some prior occasion. Moreover, the testimony was not significant in connection with the conviction for possession of marijuana for sale.

## **II. The Trial Court Had No Duty To Instruct The Jury That Bass Was An Accomplice**

Defendant contends that the trial court violated its sua sponte duty to instruct the jury that Bass was an accomplice with regard to the possession of marijuana for sale charge. The trial court did not err.

### *A. Application of Relevant Legal Principles*

Section 1111 provides, “A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.”

“If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining ‘accomplice.’ [Citation.] It also must instruct that an accomplice’s incriminating testimony must be viewed with caution [citation] and must be corroborated [citations]. If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury [citation]; otherwise it must instruct the jury to determine whether the witness is an accomplice [citation]. [Citations.]” (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.) “[I]f the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony. [Citation.]” (*People v. Horton* (1995) 11 Cal.4th 1068, 1114.)



To be chargeable as an accomplice, the witness must directly commit the act constituting the offense or aid or abet in its commission. (*People v. Avila* (2006) 38 Cal.4th 491, 564.) “An aider and abettor is one who acts with both knowledge of the perpetrator’s criminal purpose and the intent of encouraging or facilitating commission of the offense.” (*Ibid.*) A person’s liability as an aider and abettor “depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator’s criminal purpose. [Citation.] It is not sufficient that he merely gives assistance with knowledge of the perpetrator’s criminal purpose. [Citations.]” (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) When a person assists a perpetrator solely out of fear of the perpetrator, the person lacks the requisite criminal intent to be an aider and abettor. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1138; *People v. Brown* (1970) 6 Cal.App.3d 619, 624.)

Bass’s uncontroverted testimony established that she assisted defendant by storing his drugs in her room because defendant intimidated her. Defendant contends that no competent evidence established that he forced Bass to hold the marijuana for him. Defendant contends that Bass’s “general testimony” about being intimidated by him was stricken.

Bass’s testimony concerning defendant’s intimidation is as follows:

“Q Well, the first time that you interacted with him, did he – you know, what did he do?

“A He made it like it would be – it would behoove me that I put these drugs in my house, like it would behoove me. The intimidation. Like, it was to my better interest that these drugs would go in my house, you know, and putting me in a predicament that I really did not like being in because I would have to take these drugs to the park. I did not hang out in that park.

“[Defense counsel]: Objection. Motion to strike as nonresponsive. Also speculation.

“The Court: Sustained.

“The Witness: I did not hang out in that park.

“[Defense counsel]: Motion to strike the last response.

“The Witness: I didn’t hang out in that park.

“The Court: Sustained.”

The exchange between the parties and the trial court suggests that the objection to Bass’s testimony was to her testimony about hanging out in the park and not to defendant intimidating her into holding his drugs. Bass’s testimony about hanging out in the park is the testimony that the trial court struck. Her response to everything but hanging out in the park is responsive and not speculation. Accordingly, the only evidence adduced at trial concerning why Bass stored drugs for defendant was her testimony that defendant intimidated her. Such evidence was sufficient to establish as a matter of law that Bass did not have the requisite criminal intent and was not an accomplice (*People v. Anderson, supra*, 43 Cal.3d at p. 1138), thus relieving the trial court of its sua sponte duty to instruct on accomplices. (*People v. Horton, supra*, 11 Cal.4th 1068, 1114.)

#### *B. Prejudice*

Even if the trial court erred in failing to instruct the jury that Bass was an accomplice, any such error was harmless. “A trial court’s failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] “Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]” . . . The evidence is “sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.” [Citation.]’ [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 556.)

Bass’s testimony concerning defendant’s possession for sale of the marijuana was sufficiently corroborated. Officer Joseph recovered seven bags of marijuana from Bass’s room that contained a certain type of marijuana. Office Joseph testified that those seven bags were possessed for purposes of sales. Officer Joseph recovered a single bag of marijuana from defendant’s person. Officer Joseph testified that the bag of marijuana recovered from defendant’s person was packaged identically to the seven bags of marijuana that he recovered from Bass’s room. Officer Joseph further testified that he

compared the marijuana in the bag he recovered from defendant to the marijuana in the bags he recovered from Bass's residence and determined that they smelled the same, looked the same, and appeared to be the same type of marijuana. Officer Joseph's testimony tended to connect defendant with possession for sale of the seven bags of marijuana in such a way as to satisfy the jury that Bass was telling the truth.<sup>4</sup> (*People v. Brown, supra*, 31 Cal.4th at p. 556.)

### **III. Cumulative Error**

Defendant contends that even if neither the trial court's admission of Bass's contested testimony nor its failure to instruct on the principles governing the law of accomplices standing alone requires reversal of the judgment, the cumulative prejudicial effect of these errors rendered his trial fundamentally unfair and a violation of due process. The cumulative effect of any error is harmless. Moreover, because we reject both of defendant's contended errors, there is no cumulative prejudicial effect justifying reversal.

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<sup>4</sup> We note also, that section 1111 is, by its terms, offense specific. (*People v. Felton, supra*, 122 Cal.App.4th at p. 273.) Thus, when the witness is an accomplice only to one of several crimes about which the witness testifies, the corroboration requirement applies to that offense only. (*Ibid.*; *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546.) Accordingly, because Bass was an accomplice, if at all, to the possession of marijuana for sale charge, any error and resulting prejudice in failing to instruct on accomplices did not apply to the criminal threat charge.

**DISPOSITION**

The judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.